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No. 03-701

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES S. and REBECCA DEATON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Brief of Amici Curiae Nationwide Public Projects Coalition, West Valley Water District of San Bernadino, CA, Metropolitan Denver Water Authority of Littleton, CO, Cobb County-Marietta, GA Water Authority and Consolidated Mutual Water Company of Colorado in Support of Petitioners

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland.

There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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The Nationwide Public Projects Coalition, headquartered in Colorado, with Coalition members the West Valley Water District of California, the Metropolitan Denver Water Authority, the Cobb County-Marietta Water Authority of Georgia and The Consolidated Mutual Water Company of Colorado, as amici curiae, respectfully submit this brief in support of Petitioners James and Rebecca Deaton.[1]

INTERESTS OF THE AMICI CURIAE

The Amici are cities, water and wastewater districts, and private entities that serve public agencies that provide essential services to the public. Amici believe that the current unsettled status of the jurisdictional reach of the Clean Water Act ("CWA"), and the fact that the responsible agencies have declined to cure this uncertainty, requires the Court to step in and resolve these outstanding questions. The current lack of clarity has profound implications for the ability of Amici's members and other participants to provide public services in a timely and cost efficient manner.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in municipal water supply, flood control, agricultural irrigation, and wastewater and stormwater management. These agencies represent some fifteen million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's goal is to represent the public's interest in ensuring that vital public infrastructure services are provided

[1] The parties have consented to filing of this brief. The Amici have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the Amici and their counsel has made a monetary contribution to the preparation and submission of this brief.

in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominately of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and the essential needs of the public.

The West Valley Water District of San Bernadino, California ("WVWD") is an independent special water district that serves a population of approximately 55,000 citizens.

The Metropolitan Denver Water Authority of Littleton, Colorado ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia that supplies water to more than 700,000 people in the rapidly growing Metro-Atlanta area.

The Consolidated Mutual Water Company ("CMWC") is a mutually owned, and serves an estimated population of 83,000 people in Jefferson County, Colorado in the Western region of Metropolitan Denver.

This case has a profound impact on the Amici, and on the public that they serve. The U.S. Army Corps of Engineers' ("Corps") inconsistent assertion of CWA regulatory jurisdiction even over de minimus ditches, swales, intermittent streams and drainages, dry washes and many

other remote, ephemerally wet areas alleged to be connected by the most tenuous of means to larger bodies of water affects public and private projects throughout the Nation, and contributes little or nothing to the protection of the environment.

This inconsistency is compounded by the clear split among federal circuits over the proper scope and interpretation of the Supreme Court's 2001 decision in Solid Waste Agency v. United States Army Corps of Engineers ("SWANCC"), 531 U.S. 159 (2001). Several regional offices of the United States Environmental Protection Agency ("EPA") and divisions of the Corps overlap two or more circuits that have arrived at opposing conclusions regarding CWA jurisdiction in the wake of SWANCC. Therefore, the practical effect of the split is to make it incumbent upon individual regulators to evaluate competing legal standards depending upon where a particular project or parcel happens to lie.

The reigning confusion over the proper jurisdictional reach of the CWA in the wake of SWANCC has a chilling effect on public projects by allowing the Corps and the EPA[2] to override carefully considered decisions and investments of state and local governments that are intended to meet vital

[2] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. See 43 Op. Att'y Gen. 15 (1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. See Margaret N. Strand, Wetlands Deskbook, (2d ed. 1997) (Mem. of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)).

public needs, including lifesaving infrastructure. As it is, in the absence of any clear guidance, public agencies such as the Amici are often at the "whim" of a particular regulator as to the jurisdictional test to be employed. The "real world" impacts for public projects are profound.

For example, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. Depending on the jurisdiction, these agencies may require authorization from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the maximum capacity and proper functioning of the flood control systems during major flood events. These activities are especially critical for NPPC members in Southern California that must rapidly clean out accumulated sediment from flood control channels to prevent flood damage and loss of life. Many of these areas have water during storms but are otherwise dry. In the wake of SWANCC, and in the face of inaction by the U.S. Environmental Protection Agency ("EPA") and the Corps, the Amici have found it difficult if not impossible to predict where and when CWA jurisdiction will be imposed.

The Fourth Circuit's holding in United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), is representative of a trend among some circuits to limit the SWANCC decision to the overturning of a single EPA regulation, the "Migratory Bird Rule." These courts sharply reserve SWANCC to its facts, while propagating a broadly inclusive test (the so-called "migratory molecule" test) for federal jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., ("CWA") (2003). Such a test would, in fact, include the very

isolated wetlands found to be outside the jurisdiction of the CWA in SWANCC.

Amici believe that this Court did not intend for SWANCC to be applied in such a limited fashion. In our view, the court performed a careful and accurate review of the grounds upon which the CWA jurisdiction is based. Amici believe that the reading of SWANCC represented by the Fifth Circuit's recent holding in In re Needham, -- F.3d--, 2003 WL 22953383 (5th Cir. Dec. 16, 2003) is an accurate reading of the Court's concern in SWANCC with the violation of traditional local and state prerogatives.[3]

Thus, clarification of the current confusion by the Court is essential to provide the Amici's diverse membership with minimal levels of certainty and predictability in the processes necessary for design and implementation of public works projects. The Amici's members invest countless hours and hundreds of millions of tax dollars planning, assuring financing, preparing for, and constructing public service projects of significant, long-term cost. If projects that impact only remote and ephemeral waters (such as the drainage ditches at stake in Deaton) are subject to the complex CWA 404 permitting process, countless hours and millions of tax dollars for vital public works projects could be needlessly sacrificed. The long-range consequences for the Nation may include significant decreases in not only the quantity and quality of public works projects, but also the

[3] Indeed, SWANCC made it absolutely clear that intrusion of federal jurisdiction into matters traditionally reserved to state and local governments (such as land use) cannot be permitted, absent a clear statement of Congressional intent not found in the CWA. SWANCC, 531 U.S. at 172-173. Disregard of this clear holding is, in Amici's view, among the primary flaws in the reasoning of the Fourth Circuit in Deaton.

ability to timely deliver public services necessary to protect public health and welfare.

SUMMARY OF ARGUMENT

1. The limited reading of the SWANCC decision embodied by Deaton and shared by decisions in the Sixth, Seventh and Ninth Circuits stands in stark contrast to the analysis of the Fifth Circuit in Needham and other cases. The limited reading in Deaton grants the federal government an overbroad jurisdictional reach, and disregards significant aspects of the SWANCC decision.

2. The geographic reach of many of the EPA and the Corps's regional offices include states from circuits on both sides of the split over SWANCC. This forces the regulators to determine which test they will apply to which projects based upon location and the current state of case law in a given circuit. Individual regulators thus decide the reach of Congress's Clean Water Act authority.

3. The broad jurisdictional reach granted by Deaton will make it very difficult for Amici to utilize the "fast track" Nationwide Permit Program for the public activities they perform. Forcing such critical activities into the individual permit program will greatly increase costs of delivering important public services such as water supply and flood control.

4. The Corps and the EPA, as responsible agencies, have stated that they will not issue new regulations to resolve this uncertainty, or recognize the new limitations upon their authority represented by SWANCC. Action by the Supreme Court is thus the only means by which this confusion can be resolved, and the holding in SWANCC be given its intended effect.

ARGUMENT

I. The Split Between the Circuits is Manifest

In the wake of the Supreme Court's decision in SWANCC, courts have scrambled to re-evaluate the scope and reach of the government's regulatory authority over "navigable waters" pursuant to the CWA. The split in interpretation among the courts wrestling with SWANCC was deep and instantaneous. In the three years since the high Court ruled, two diametrically opposed, fully articulated interpretations have emerged among the federal courts.

Courts in the Ninth, Fourth, Sixth and Seventh Circuits have interpreted the decision as a limited holding of no significant jurisdictional import beyond the invalidation of the controversial 1986 regulation allowing the Corps to assert jurisdiction over isolated wetlands based on their use by migratory birds (the "migratory bird rule"). Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,208, 41,217 (Nov. 13, 1986). This group includes the Fourth Circuit's decision in Deaton, at issue here.

In Deaton, the Fourth Circuit upheld the Corps's assertion of jurisdiction over drainage ditches, tributaries of all description, and isolated wetlands that have any type of surface water connection to regulated "navigable waters," no matter how attenuated or intermittent. The court in Deaton gave significant deference to the Corps's expansive definition of "tributary," which asserts jurisdiction even over a roadside ditch with only a tenuous link to a navigable water is jurisdictional, even in the absence of evidence that water from the ditch actually reaches the navigable water. The construction of "tributary" jurisdiction in Deaton is substantially similar to, and indeed is derived from, that found in United States. v. Rueth Development Co., 189 F.

Supp. 2d 874, 877 (N.D. Ind. 2001) (vacated by application of consent decree), aff'd., 335 F.3d 598 (7th Cir.), cert. denied, 72 U.S.L.W. 3282 (2003).

In the Rueth case, the District Court initially ruled that if "a molecule" of water from the disputed wetland eventually intermingles with the molecules of a navigable water, the Corps has jurisdiction: "A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River . . . the Site, therefore, has the 'significant nexus' to a navigable waterway [required by SWANCC]." Id. This "migratory molecule" theory is the most extreme and aggressive construction of the Corps's authority yet acknowledged by a post-SWANCC court, and it is this construction which was asserted by the Corps and upheld by the Fourth Circuit in Deaton.[4]

Courts arriving at this conclusion are, quite simply, ignoring the clear import of the SWANCC decision. Confronted with the limitations clearly set forth in SWANCC, they have simply constructed and applied an even more inclusive standard of adjacency and tributary jurisdiction. However, common sense must prevail here. It is common knowledge that the natural water system in the United States is not rigidly separated by physical boundaries. Justice Stevens, dissenting in SWANCC, noted that most wetlands designated as "isolated" in fact have some degree of hydrological connection to the surrounding water system. SWANCC, 531 U.S. at 176, n.2. However, if a single molecule is enough to create jurisdiction, then the Corps has jurisdiction over practically every drop of water anywhere in

[4] In Deaton, the Fourth Circuit upheld the Maryland District Court's Order denying the Deatons' Motion to Reconsider. Deaton, 332 F.3d at 714. In that Order, the district court cites Rueth for the single-molecule test. United States v. Deaton, No. MJG 95-2140, slip op. at 17 (D. Md. Jan. 28, 2002).

the nation, unless that drop of water is caught in a jar as rainfall from the sky. Under this reading, even the waters at issue in SWANCC would still be jurisdictional.

In contrast, the Fifth Circuit recently reaffirmed its own, more far-reaching reading of SWANCC in the case of Needham. In Needham, the Fifth Circuit determined that SWANCC restricted the authority of the Corps and the EPA over waters and wetlands that are a significant distance from traditionally navigable waters.[5]

The Needham decision reaffirmed the Fifth Circuit's decision in Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), and argued strongly for a broad construction of the reach of the SWANCC decision. In Harken, the owner of the surface rights to a tract of land utilized for oil exploration and drilling filed suit under the Oil Protection Act ("OPA") against the drilling company for the accumulated damage to the soil and groundwater resulting from many small-scale discharges of oil and other pollutants onto the soil, and eventually into Big Creek, a small seasonal creek. Big Creek was variously reported to be "seasonal," "intermittent," and occasionally underground (discharges occurred on land "that only infrequently carried running water").

The plaintiffs argued, and the court agreed, that Congress intended for "navigable waters" to have the same meaning under the OPA as under the CWA but that in light of SWANCC, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." Id. at 270. Continuing its OPA analysis

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[5] That is, "navigable-in-fact," as developed by the Daniel Ball line of cases: Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

in the context of the CWA definition, the court concluded that neither the groundwater nor the non-navigable creek at issue were protected by the CWA (and, therefore, fell outside the OPA as well). The court also declined to extend the coverage of the CWA to a discharge on dry land that seeps into groundwater, which in turn seeps into a navigable water.

The Fifth Circuit's return to this topic in Needham reconfirmed the position that SWANCC was a more meaningful curtailment of Corps jurisdiction than the limited cases admit. It is here that the split is most obvious, as the Fifth Circuit in Needham took the Fourth Circuit specifically to task for its decision in Deaton:

> According to the government, the definition [of "navigable waters" found in 40 C.F.R. § 300.5 (2003)] covers all waters, excluding groundwater, that have any hydrological connection with "navigable water." At least two courts appear to have agreed with this expansive interpretation. [citing Deaton and United States v. Rapanos, 339 F.3d 447, 449 (6th Cir. 2003)].
>
> In our view, this definition is unsustainable under SWANCC. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *Consequently, in this Circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of navigable water.*

Needham, 2003 WL 22953383, at *3 (emphasis added). The Fifth Circuit clearly has staked out a position in direct opposition to that defined in the Fourth.

While the Fifth is at this time the only Circuit to adopt this position, the District Court of New Jersey in FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D.N.J. 2003), ruled in similar fashion that the decision in SWANCC had repercussions beyond the elimination of a single regulation. Rejecting the "migratory molecule" test, the district court required the Corps to show evidence of "substantial injurious impact" to a navigable water, thus establishing a "significant nexus" between the regulated site and a "navigable" water. Id. at 517. The FD&P court recognized that this was not an unanimous reading of SWANCC, noting that "[c]ourts interpreting the scope of Solid Waste have essentially split into two camps" on this question. Id. at 513.[6]

In our view, the rationale most recently articulated by Needham, Rice, and FD&P reflects the most accurate and objective interpretation of the SWANCC decision, and should be adopted by this Court.

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[6] Other courts throughout the country have recognized this split. Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003); N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003).

II. The Public Interest is Damaged by This Continuing Uncertainty.

The split between the circuits has created an untenable situation. Both the regulators and the regulated are forced to make plans and perform their duties based upon estimates and guesswork regarding what the relevant jurisdictional standard is, in a shifting and confusing legal landscape.

A. Due to the Overlap of EPA Districts With Federal Circuits, the Current Split in the Circuits Forces Regulators to Apply Disparate Standards for Different Projects Within their Authority.

As noted above, the Attorney General has determined that the EPA is ultimately responsible for jurisdictional determinations ("JDs") under the CWA, but, in practice, EPA relies upon the Corps as the primary agency in most cases for JDs. See note 2, supra. Thus, the current split in authority has at least one very practical consequence: regulators in Corps and EPA regional and district offices must be prepared to apply divergent standards to the subjects of their jurisdiction, depending on where within the region the site is located.

To take just one example, this chart illustrates the quandary of the regulators and regulated in EPA Region Four:[7]

STATE	GOVERNING CIRCUIT	GOVERNING DECISION
Alabama. Florida, Georgia	Eleventh	n/a
Kentucky, Tennessee	Sixth	Rapanos
Mississippi	Fifth	Harken / Needham
North Carolina, South Carolina	Fourth	Deaton

Mississippi lies within the Fifth Judicial Circuit, and thus must be governed by the limited jurisdiction correctly described in the Harken and Needham decisions. North and South Carolina both lie within the Fourth Circuit, and thus are subject to the more far-reaching jurisdictional grant represented by the Deaton case. Activities in Tennessee and Kentucky must be evaluated by the standards of the Sixth Circuit's decision in Rapanos, which derives largely from Deaton. Rapanos, 339 F.3d at 452. Alabama, Florida, and Georgia make up the Eleventh Circuit, which has yet to specifically address the SWANCC decision.[8]

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[7] See Standard Administrative Regions of States and Corresponding Coast Guard Districts and EPA Regions, 33 C.F.R. Pt. 153 (2003), Subpt. B, Tbl. 2 (EPA Regions); 28 U.S.C.A. § 41 (2003) (Federal circuits).

[8] Further confusion reigns in EPA Region Six, which serves Louisiana, Arkansas, Oklahoma, New Mexico, Texas, as well as some Indian lands. Louisiana and Texas lie within the Fifth Judicial Circuit, and thus must also be governed by Harken and Needham. However, no district or circuit courts in the Tenth (New Mexico) or the Eighth (Arkansas) Circuits have specifically addressed the SWANCC decision.

This confusion is exacerbated by the complex organizational structure of the Corps. The Mississippi Valley Division of the Corps covers the entire length of the Mississippi, from Minnesota to Louisiana, and includes six individual Corps Districts.[9] As it wanders to the Gulf, the Mississippi Valley Division encompasses portions of the Eighth, Seventh, Sixth, and Fifth Federal Circuits:[10]

STATE	GOVERNING CIRCUIT	GOVERNING DECISION
Minnesota, North Dakota, South Dakota, Iowa, Missouri, Arkansas	Eighth	n/a
Illinois, Wisconsin	Seventh	Rueth
Kentucky, Tennessee	Sixth	Rapanos
Mississippi, Louisiana	Fifth	Harken / Needham

Therefore, a single Corps Division encompasses states governed by the diametrically opposite decisions of Rapanos and Needham, while also including states governed by the Rueth decision in the Seventh Circuit, and six states for whom the Eighth Circuit has provided no guidance at all.

Therefore, it is up to the regulators themselves to decide which test they will apply to the residents of those

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[9] The included districts are: St. Paul, Rock Island, St. Louis, Memphis, Vicksburg, and New Orleans.

[10] See http://www.mvd.usace.army.mil/main.php (Mississippi Valley Division of the Corps); 28 U.S.C.A. § 41 (2003) (Federal circuits).

states. Each regulator is individually confronted with a question upon which the United States federal court system has failed to reach unanimity. Such discretion is utterly inappropriate. What is more, this discretion has been enshrined in Corps and EPA policy. In January 2003, the EPA and the Corps issued a "Joint Memorandum and Advanced Notice of Proposed Rulemaking (ANPRM)" in an attempt to provide a clearer interpretation of SWANCC's meaning. 68 Fed. Reg. 1991-01 (Jan. 15, 2003). However, in that guidance, the regulators instructed the Corps field staff to "make jurisdictional and permitting decisions on a case-by-case basis, considering this guidance, applicable regulations and any additional relevant court decisions." Id. In other words, it has therefore devolved to the individual regulator to determine the reach of Congress's Clean Water Act jurisdiction.

B. The Rationale In Deaton Will Adversely Affect Vital Public Projects By Subjecting Them To The Onerous Individual 404 Permit Program In Many Cases.

To compound this problem, the Deaton decision has occurred at a time when the permitting process under the CWA is becoming increasingly onerous. In March 2000, the Corps made substantial changes to the "fast track" Nationwide Permit ("NWP") program under section 404 of the CWA; phasing out NWP 26 for impacts to isolated or headwaters areas and substituting it with a number of activity-specific nationwide permits.[11] Under the prior program, the Amici relied on NWP 26, which permitted

[11] See Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000). The permits were reissued, without significant modification in 2002. See Corps, Final Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002).

discharges of up to three acres in certain "isolated" waters or "headwater" wetlands. However, under the revised program, there is a maximum one-half (1/2) acre limit for impacts to "Waters of the United States."

The Deaton rationale will sweep transitional waterbodies such as drainage ditches, and ephemeral ponds under the CWA "umbrella."[12] Given the size and scope of most public projects, it will be virtually impossible to come under the 1/2 acre NWP limit if ephemeral areas are considered jurisdictional. As a result, Amici's members will be denied access to the NWP process and be subject to the far more onerous and time-consuming individual permit process.[13]

III. The EPA and Corps of Engineers have Refused to Resolve the Current Jurisdictional Confusion.

The judiciary has not been the only branch of government confronting SWANCC and its progeny since the Court's 2001 decision. Following hearings in the House

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[12] The Preamble for the NWP regulations state that "an ephemeral stream is a water of the United States provided it has an ordinary high water mark (OHWM)." 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000). The practical impact is that any person planning to impact a transitionally wet area, ranging from small rain depressions to dry washes must first obtain a 404 permit provided a Corps reviewer finds "water marks" on the ground that qualify as an OHWM, in his or her subjective judgment.

[13] The individual permit process involves a detailed evaluation of whether a proposed discharge is in the "public interest." The Corps considers and balances many factors and must determine that there are no practicable alternatives to the proposed discharge, see 33 C.F.R. § 322.4 (2003), and must also comply with EPA's detailed 404(b)(1) guidelines, see 40 C.F.R. § 230 (2003). This involves individual public notices allowing for agency and public comment that must be considered before a permit may be issued. The Corps must prepare detailed findings to support its permit decision.

Government Operations Committee, the Corps and EPA on January 15, 2003, issued a Joint Memorandum and ANPRM in an attempt to provide a clearer interpretation of SWANCC's meaning. 68 Fed. Reg. 1991. As noted above, the Memorandum leaves the legal determinations of jurisdiction to individual members of the agencies' field staff. Id. at 1998.

The ANPRM resulted in extensive comments for many affected interests. Over 133,000 comments were received. Groups issuing comments included four Indian Tribes, forty-two States, local governments, academic, research and scientific organizations, industry, non-profits, and the general public.[14] Much of the commentary provided information and data regarding the ecological value of various aquatic resources, including isolated wetlands and intermittent streams. At the other end of the spectrum, many comments rejected the idea that impact on aquatic resources is relevant to determining CWA jurisdiction.

Despite this massive outpouring of commentary, in a press release sent out on December 12, 2003, the EPA and the Corps made clear that they would take no action to resolve the confusion sown in the wake of the SWANCC decision, and would leave the January 2003 Joint Memorandum to stand unrevised.[15] However, that guidance does very little to clear up the quagmire of nebulous regulations. By providing no detailed or definitive criteria

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[14] Federal Jurisdiction of Navigable Waters Under Clean Waters, 2003 WL 56335158, at 6 (2003) (Statement of G. Tracy Mehan, Assistant Administrator for Water, U.S. Environmental Protection Agency).

[15] Release available at http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument.

for field staff, and in fact encouraging field staff to perform factual and legal comparisons of competing federal circuit cases on a case-by-case, permit-by-permit basis, Corps and EPA Headquarters have simply perpetuated the already intolerable level of confusion in the section 404 program.

CONCLUSION

It does not appear likely that either Congress or the Agencies will act to resolve the confusion that currently reigns among the regulated and regulators alike regarding the jurisdictional extent of the section 404 program in the wake of SWANCC. The Court should accept this case for review for two reasons. First, the current jurisdictional conflict regarding the jurisdictional reach of the CWA must be resolved. Second, silence by the Court may well amount to a de facto reversal of much of the holding in SWANCC. Clarification of these issues is essential to provide certainty and predictability to the vital public projects that depend upon clear federal guidance consistent with traditional authority of state and local governments in regulating land use.

January 30, 2004

Respectfully submitted

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